THE FAMILY AUTOMOBILE

THERE is a persistent hue and cry against the immobility of the law, and an appeal for "progressive decisions," and the "humanizing" of the courts. It is argued that changed conditions justify departures from established rules and precedents, and our system of case law is abused because of the failure of the courts to veer with the wind of popular opinion. As a matter of fact our courts and their decisions move forward with amazing alacrity in abandoning established rules whenever necessary to meet the popular view of right and justice. Long ago the courts refused to apply the ordinary rules of law in insurance cases, so that policies of insurance are no longer subject to the law of contracts. The ordinary rules of the law of master and servant sufficed in determining the liability of the owner in cases involving accidents caused by vehicles of transportation, until the appearance of the automobile, which now serves in place of every kind of a vehicle from a dray to an express train, fast replacing the horse in domestic commercial life.

Many courts have deemed it necessary for the protection of the life and limb of the public to hold the owner of an automobile to a stricter accountability than is afforded by the law of master and servant. Refusing to hold automobiles as dangerous *per se*, considerable difficulty is being met with in keeping up with the popular demand on the subject, and at the same time remaining in harmony with established principles of law.

The courts, however, have not yet gone to the length of holding that the owner of an automobile is liable for injuries occasioned through its negligent operation by reason of ownership alone. The nearest approach to that is in the case of Birch *v.* Abercombie,[1] in which the Supreme Court of Washington held that ownership of an automobile established *prima facie* that it was in the possession of the owner at the time of the accident, and that the driver was acting for the owner.

[1] 74 Wash. 486, 133 Pac. 1020.

The doctrine of dangerous instrumentalities has been repeatedly rejected by the court in its application to automobiles. In a Georgia case [2] it was aptly said: "It is not the ferocity of automobiles that is to be feared, but the ferocity of those who drive them. There are times when these machines not only lack ferocity but assume such an indisposition to go that it taxes the limit of human ingenuity to make them. They are not to be classed with bad dogs, vicious bulls, and evilly disposed mules and the like."

In a recent Alabama case [3] the court said:

> "Automobiles are not to be classed with such highly dangerous agencies as dynamite or savages. They are not dangerous *per se*. Prudently driven they are safer than the horse-drawn vehicle."

In Colbourne *v.* Detroit United Railway,[4] the Supreme Court of Michigan, in a case decided Sept. 30, 1913, said of automobiles:

> "In the light of common knowledge, courts can well take judicial notice of the automobile, not only as the most useful and pleasing means of swiftly transporting persons and property for pleasure or business when properly controlled and driven, but as a vehicle in its possibilities so destructive when in the hands of careless and reckless drivers as to spread over the land the maimed and dead until it has belittled the cruelties of the car of Juggernaut."

The danger of automobiles consists, therefore, in their negligent use. They are not regarded as nuisances because apt to frighten horses, any more than ox-teams or the prairie schooner variety of wagons, and no one questions the right to use the oxen and wagon in the public highway.[5]

---

[2] Lewis *v.* Amorous, 3 Ga. App. 50, 59 S. E. 338.

[3] Parker *v.* Wilson (Ala.), 60 South. 150.

[4] 177 Mich. 139, 143 N. W. 32.

[5] "The law does not denounce motor carriages, as such, on the public highways. For so long as they are constructed and propelled in a manner consistent with the use of the highway and are calculated to serve the public as a beneficial means of transportation, with reasonable safety to travelers by ordinary modes, they have an equal right with other vehicles in common use to occupy the streets and roads." Ind. Springs Co. *v.* Brown, 165 Ind. 465, 74 N. E. 615.

If one is injured through the negligence of another, on principle he must proceed against either him by whose negligence the injury was occasioned, or against the one who is responsible for that person's negligence. The person negligently operating the machine is liable, just as the engineer of a locomotive, but the injured person may and usually does desire to reach the owner of the machine as the responsible person. When the owner is not operating the machine his liability really depends, not on his fact of ownership, but on the doctrine of master and servant, known in the law as the doctrine of *respondeat superior*. To reach the owner in such case it should appear that the party actually causing the accident was the servant or agent of the owner at the time. That alone, however, is not sufficient. It should appear also that the servant or agent was acting in the course of his employment and in furtherance of the master's business.

On principle, therefore, we have to apply the law of master and servant to the case with all its rules and exceptions. Where the machine is negligently operated by a hired chauffeur the question is not so difficult. If the chauffeur was at the time acting for me and in my business, I, as the master and not even then as owner, am liable. But when he acts beyond the scope of his employment he is as much a stranger to me as to any other third person, and if his act is not done in the execution of some service for which he was engaged, his act cannot be regarded as my act, and I am not responsible for it.

Thus where a chauffeur took a pleasure trip of his own, even when using the automobile with my knowledge and consent, I am not liable for his negligence. Whenever he steps aside from my business, for however short a time, to do an act not connected with my business, the relation of master and servant is for the time suspended, and his act cannot be attributed to me. For example, where the driver of a carriage was ordered by the master to drive to the stable, but he turned out of his course to a saloon to get a drink, and there left his horses unattended, and they ran away and injured a person, the master was held not liable.[6] Of course a mere deviation from the direct route,

[6] McCarty *v.* Timmins, 178 Mass. 378, 59 N. E. 1038.

or from the strict course of his duty, will not relieve the master from responsibility. The fact that the servant was doing something that he was not authorized to do, or that the master didn't know that he was going to do, or even doing something that the master disapproved or forbade, does not necessarily relieve the master from liability, if at the time the servant was acting for the master and in the course of his business. Whether he was acting within the scope of his employment and in furtherance of his master's business, or outside of that scope and in furtherance of some business of his own is a difficult question, and depends upon the facts and circumstances of each particular case. Hundreds of cases are reported in the law books involving those questions. Many fine distinctions are drawn, but the limits of this paper will not permit of any further discussion of that subject. It perhaps is difficult to understand how a master is relieved from liability if a servant is acting without the scope of his authority, and held liable if that servant is actually doing a forbidden act but within the scope of his employment. A single illustration may aid to comprehend the apparent inconsistency.

A chauffeur went to a hotel where his employer was staying and informed him that oil was needed for the lamps of the automobile, and the owner told him to "go down stairs in the hotel and get it," but instead the chauffeur drove the automobile to a garage for oil, and while on his way collided with a horse and carriage. It was held that, although the chauffeur made use of the master's automobile in apparent disobedience of his instructions, he was nevertheless engaged in the furtherance of his master's business, and that the inference is legitimate that he was acting within the general scope of his authority, which was to care for the machine, keep it in order and drive it on occasion. Now if that driver instead of going for the oil, had gone for a drink, the master would not have been liable, because he was not doing something which in any degree pertained to the duties he was hired to perform.

It will thus be seen that it is not sufficient to hold the owner to show that he owned the automobile, and that it was being negligently driven by his chauffeur. Under such circumstances it will perhaps be presumed that the chauffeur was acting within

the scope of his employment, and the burden is on the owner to show to the contrary, but if he can do so, he is relieved from liability.

The difficult situation is presented when an injury is occasioned by a family automobile while operated by a member of the family other than the owner. I dare say that most of the automobiles used in the cities are family vehicles belonging to the fathers or heads of the families and used for the pleasure and convenience of their families. The machine is driven by the different members of the family who are old enough to run it. It is used by some members at times for their own pleasure or convenience. Frequently friends or acquaintances are ridden as guests, and sometimes those friends take their place at the wheel. The liability of the father is thus presented under every conceivable state of facts.

The prime object of this paper is to present that phase of the question. We have seen that the owner is not liable on principle unless the injury is occasioned by himself, or by some one acting for him within the scope of his authority. The relation of master and servant must be shown. A parent is not liable for the negligent acts of his child, even though he be a minor. If a son is employed by the father, then the father is responsible for his conduct while performing the duties of his employment; but such liability arises from the relation of master and servant and not from that of parent and child. Merely because a son while using his father's automobile negligently injures a third person, is not of itself sufficient to render the father liable. The liability of one person for the negligence of another depends upon the contractual relation between the two as master and servant. In the absence of such relation, no one can be held responsible for the conduct of another. It is undisputed that the owner of an automobile is not liable for an injury to a third person due to the negligent operation of his automobile by one to whom he has lent it. The fact that he lent it to his son instead of his neighbor ought on principle to make no difference. Even if the son is acting for the father as his driver of the machine, the father is not liable on principle for the acts of that son while using the machine on some private enterprise of his own.

One of the leading family automobile cases is Daily *v.* Maxwell,[7] decided in 1911, in which the Kansas City, Mo., Court of Appeals, while purporting to recognize the principles of master and servant as applicable, held that where a father purchased an automobile for the use of his family for pleasure, he was liable for the negligence of his minor son while operating the machine for his own pleasure with the permission of the father. That was done on the theory that the machine was being used for one of the very uses for which the father kept it; that it was a pleasure vehicle, and when used for the pleasure of one of the minor children of the owner it was being used on business of the owner. The court said:

> "It is the practice of parents to provide their children healthful and innocent amusements and recreations, and certainly it is as much the business of parentage to supervise and control the pleasures of their children as it is to give them nurture and education. Had Ernest been taking his mother for a pleasure ride instead of taking some of his young friends, no one would contend that he was not on his father's business; or, had he been using the car on an errand of his own, such as shopping for himself, or going to school, he would have been on his father's business, since it was the duty of the father to support and educate him. The rule that a father is not liable for the torts of his minor child applies only to cases where the tort is committed without the consent of the parent and without the scope of any duty he owes his child. We conclude that, in running the car with the consent of his father and within the scope of family uses, Ernest was the agent and servant of his father."

In Smith *v.* Jordan,[8] decided a little later, the Supreme Court of Massachusetts held a father liable where a son was driving his mother, and negligently caused a collision. In this case the father purchased the machine for the general use of his family, and that son was the only member of the family permitted to

---

[7] 152 Mo. App. 415, 133 S. W. 351. See also, McNeal *v.* McKain, holding the father liable when an injury occurred because of the son's negligence. In this case the son was driving a guest of the family. This case, while seemingly approving the Missouri case, does not go to that extreme length.

[8] 211 Mass. 269. 97 N. E. 761.

run it. The court held that the use of the machine by the wife was not her business but that of the husband, and that the son in operating the machine was doing so in furtherance of the father's business. But the court in that case said that it was not a case of mere permissive use of the father's vehicle by the son for his own pleasure, and that if the act was not done by the son in furtherance of the father's business, but in performance of some independent design of his own, the father would not be liable. This case is against rather than in favor of the Missouri case, as the liability was placed merely on the fact that the evidence was sufficient for the jury to find that a request by defendant's wife was equivalent to a direction by him for his son, as his hired man, to perform for him a service.

In the case of Doran *v.* Thomsen,[9] the New Jersey court held that a father is not liable for the negligent operation of his machine by his daughter because she was using it for her own purposes, and was, therefore, not acting for the father, and was not his servant where she was permissively using his machine.[10]

In Stone *v.* Morris [11] the Court of Appeals of Kentucky held the father liable where a son, authorized to use the machine, took it out for the pleasure of himself and sister, approving the Missouri case above cited.

In Moon *v.* Matthews,[12] the Supreme Court of Pennsylvania held a father liable where the automobile was being operated by the regular chauffeur, in obedience to the order of a member of the family, riding guests who were friends of the father and guests of his sister, and upon an errand that was entirely proper and fitting in itself.

The opinion of the Supreme Court of Alabama in Parker *v.*

---

[9] 76 N. J. L. 754, 71 Atl. 296.

[10] Maher *v.* Benedict, 108 N. Y. Supp. 228, 123 App. Div. 579, was a case where the son was using his father's machine for his own business without his father's knowledge. The court said: "Liability cannot be cast upon the defendant because he owned the car, or because he permitted his son to drive the car whenever he wished to do so, or because the driver was his son."

[11] 47 Ky. 386, 144 S. W. 52.

[12] 227 Pa. 488, 76 Atl. 219, 29 L. R. A. (N. S.) 856, 136 Am. St. Rep. 902.

Wilson,[13] is along the lines of the New York case. The syllabus is as follows:

"Defendant, a physician in active practice, kept two automobiles for use in visiting his patients. He had a servant regularly employed to drive the machines, but on the occasion in question his son, a young man between 18 and 19 years of age, was driving one of the machines for his own purposes, without defendant's knowledge, having two other young gentlemen, not members of defendant's family, with him, and using the machine in pursuance of a general permit to use it when not otherwise in demand. While so operating the automobile, the son ran it against intestate, resulting in his death. *Held*, that the son while so driving the machine was not defendant's servant, and that defendant was not liable."

The court criticized the Missouri and like cases above cited, saying:

"The doctrine contended for amounts to this: That the pleasure of the family in its utmost detail is the business of the father. As applied to the case at hand, it means that the son, in pursuit of his own pleasure, with an automobile owned by his father, was engaged in the business of the father. But the doctrine, we think, has no firm foundation in reason or common sense. In theory it overlooks well-settled principles of law; in practice it would interdict the father's generosity, and his reasonable care for the pleasure or even the well being of his children, by imposing an universal responsibility for their acts. As said in Doran *v.* Thomsen, 76 N. J. L. 754, 71 Atl. 296, 19 L. R. A. (N. S.) 335, 131 Am. St. Rep. 677:

" 'It would subject a parent to liability if he bought for his son a baseball or for his daughter a golf club, and, by permitting them to be used by his children for their appropriate purposes, injury occurred. It bases the creation of the relation of master and servant upon the purpose which the parent had in mind in acquiring ownership of the vehicle and its permissive use by the child. This proposition ignores an essential element in the creation of that status as to third persons, that such use must be in furtherance of, and not apart from, the master's service and control, and fails to distinguish between a mere permission to use sub-

[13] *Supra.*

ject to the control of the master and connected with his affairs.'

"Our opinion is that the evidence, at best for appellant, authorized a finding of a mere permissive use by his son of the defendant's automobile, and that for the son's negligence therein the defendant is not liable."

In Linville *v.* Nissen,[14] decided by the Supreme Court of North Carolina on April 23, 1913, the father was held not liable. In that case the son took the machine on a Sunday afternoon against his father's orders, but there was evidence that it was a family machine, and that the boy had frequently acted as chauffeur. He collided with another machine while racing with it.

The court held first that there was no liability on the father on the theory that the machine was a dangerous agency; second, that the parent was not liable for the torts of his minor son because of the relationship; third, that the mere relationship did not make the child the servant of the father; and, fourth, that even if the son had been the servant of the father in driving the machine, the father would not be liable for his negligence, unless his son was acting at the time in the scope of his employment and in regard to his master's business.

In a still later case [15] decided by the Supreme Court of Georgia, the court declined to follow the cases holding an owner liable because the automobile was kept for the comfort and pleasure of the family when negligently operated by a member of the family. The court held that the liability of a parent for the tort of a minor child was analagous to the liability of a master for the tort of a servant while employed in his master's business, and in the scope of his employment. The court said:

"It seems, from these decisions, that the rule of the parent's liability for the torts of a minor child is put exactly upon the same basis as that of the liability of a master for the act of a servant. Under this rule we do not think it can reasonably be held that the fact a father should provide, and has provided, for the pleasure of his minor child makes

[14] 162 N. C. 95, 77 S. E. 1096.

[15] Schumer *v.* Register, 12 Ga. App. 743, 78 S. E. 731.

him responsible for a tort of the child committed merely in the pursuit of pleasure. To render the father liable, the tort must have been committed by the minor while actually engaged in the father's business, or with the knowledge, authority, and consent of the father, or must have been ratified by him. Fielder *v.* Davidson (Sup.), 77 S. E. 618.

"We conclude, therefore, that even if the amendment had been allowed the first count in the petition would have set forth no cause of action against Mrs. Register, for the allegations would simply show that the widowed mother had provided an automobile for the pleasure of her minor daughter, and that the tort was not actually committed by the minor child, but was committed by Sledge, the driver of the automobile, who, in so far as the first count is concerned, held no relation to the mother, but was driving the automobile under the direction and control of the minor daughter."

The case of Ploetz *v.* Holtz,[16] decided Dec. 2, 1913, by the Supreme Court of Minnesota, is interesting. On the day of the accident the father and owner of the machine left home in the morning and did not return until evening. He left his car at home in the shed, and did not know that it had been used. Two of his boys took the car over to a neighbor's, where the ladies' society was in session, for supper. They were acting wholly on their own volition. The court said:

"Whether the owner of an automobile is responsible for injuries resulting from the negligence of the person operating it is determined by the rules which govern the relation of master and servant. His liability rests upon the proposition that the principal is responsible for the wrongful or negligent acts of his agent or servant committed while acting under his express or implied authority and in furtherance of his business. He is not liable for the acts of such agents or servants committed while the latter is engaged exclusively upon his own affairs. If the master authorize the servant to use an instrumentality provided by him, and the servant negligently uses it so as to cause injury to another, the master is liable therefor, if the servant, at the time, was engaged in the business of the master, but is not liable therefor, if the servant, at the time, was not

[16] 124 Minn. 169, 144 N. W. 745.

engaged in the business of the master, but was using the instrumentality for his own purposes. * * *

"The tendency of the courts in this class of cases is to resolve doubts against the master to the extent of submitting the question as one of fact to the jury. The court submitted this case to the jury in a very clear and accurate charge. Among other things, he said: 'In order to hold L. J. Holt responsible for the negligence of Neil Holt on the occasion in question, it must appear by a fair preponderance of the evidence that Neil Holt at the time in question was using the automobile with either express or implied authority from L. J. Holt, and in serving some purpose for which the machine was procured and kept by the father, L. J. Holt.' He also said 'that, if the purpose of taking the automobile by Neil Holt was simply to serve the pleasure of himself and his brother, who, it would appear, was past majority in age, that L. J. Holt would not be bound.' These propositions were both impressed upon the attention of the jury repeatedly. By their verdict the jury necessarily found 'that Neil Holt at the time in question was using the automobile with either express or implied authority from L. J. Holt, and in serving some purpose for which the machine was procured and kept by the father, L. J. Holt.'

"The question presented to this court is whether the evidence to the contrary is conclusive, and thus required the trial court to hold as a matter of law that no liability existed as against the father. Such cars are usually procured and kept for the use of the family, and, ordinarily, such use is not limited to any special purpose. At the time in question the father was absent and the mother and minor children were at a neighbor's. It does not appear that the father had ever placed any restrictions upon the use of the car. The various members of the family had ridden in it frequently. Neil had operated it from time to time ever since its purchase. While he had been accustomed to obtain express permission before taking it, there is no evidence that he had ever been forbidden to use it without first obtaining permission. His use of the car is presumed to have been rightful until the contrary is shown. If, at the time, it was being used in part for the purposes for which it was kept by the father, the fact that Neil may also have been using it in part for purposes personal to himself would not necessarily absolve the father from liability. We think the circumstances shown by the evidence are such that

> the jury might infer therefrom that among the purposes for which Neil took the machine was that of bringing home his mother and sisters, and that he had implied authority to do so. We think there was sufficient evidence so that the court could not determine the question as a matter of law and was required to submit it to the jury."

In Davis *v.* Littlefield,[17] the Supreme Court of South Carolina on April 21, 1914, applied the family automobile theory without citation of authorities. In that case a son while driving a family car for his own personal pleasure scared a team of mules, resulting in injury to the driver of the mules. The father was held liable on the theory that the machine was being used for the sole purpose for which it was maintained, to wit, "the family pleasure." The case turned on the point as to whether the machine was being used in serving some purpose for which the machine was procured and kept by the father.

It is always difficult to determine just what purpose a family car is supposed to serve. If a son goes out in the family car for a spree, it is difficult to say what some of the courts would decide. Perhaps the case would turn on whether the father regarded such a trip as one of the pleasures he was bound as a parent to furnish his boy.

The Kansas City Court of Appeals in Daily *v.* Maxwell,[18] held the father liable for an accident caused by a minor child on the theory that the father in furnishing a family automobile was simply doing his duty in providing family recreation.

The Kansas City Court of Appeals in a later case, in Marshall *v.* Taylor,[19] held a father liable for the negligent use of a family machine by an adult son, who used it to go down town instead of walking. The court approved its former ruling in Daily *v.* Maxwell, but was compelled to abandon the theory of that case and go a step further. The court said:

> "The only difference between that case and this is that here the young man has attained his majority, was sui juris, and his father owed him no duty of parentage, and, of course, was under no obligation to provide him with means of

[17] 97 S. C. 171, 81 S. E. 487. [18] *Supra.*
[19] 168 Mo. App. 240, 153 S. W. 527.

pleasure and recreation. We do not think this fact is determinative of the question of defendant's liability. The real question at issue is not that of the legal duty defendant owed his son, but is whether or not the son was the agent of his father in running the car. Frequently fathers continue not only to support their children after the latter have become sui juris, but to provide them, as members of the family, with means of recreation and pleasure. This car was provided by defendant for the use of his immediate family. He contemplated and intended that his son should enjoy it in common with other members of the family. When in such use, it was as much in his service as it would have been had it been occupied by his wife, his daughter, his mother, or his guest. We conclude that the young man was not a mere servant using his master's vehicle for his own purpose, but was the agent of the father, operating the car for one of the purposes of its intended use."

The Supreme Court of Washington has dealt extensively with the family automobile question. In Switzer *v.* Sherwood,[20] decided June 6, 1914, the court held that where an automobile owned by husband and wife as community property, and used for the community, was negligently operated by their daughter while the husband was riding therein, a judgment was properly rendered against husband and wife for the damage awarded, following Birch *v.* Abercombie.[21] In the Birch case the automobile was owned by Abercombie and wife, and was being driven by their daughter when the injury was occasioned. The jury found by special verdicts that the daughter was driving the machine for her own pleasure, that she was not driving without the consent of her parents, and that her parents had not forbidden her to drive the machine. The facts were as follows: The father purchased the machine for the use of his family. It was sent each morning from the garage to his home for the use of his family and taken back to the garage in the evening. On the day of the accident both parents were away from home, and the daughter entertained a number of friends at luncheon. She was taking them home in the automobile when the accident occurred. The court held to the doctrine that the father is liable for an

[20] (Wash) 141 Pac. 181.
[21] 74 Wash. 486, 133 Pac. 1020.

accident caused by a family automobile because the machine was being used for the very purposes for which the father owned it, kept it, and intended that it should be used. The court disapproved the New Jersey case of Doran *v.* Thomsen,[22] and held that the machine, although driven by the daughter for her own personal uses, was being used in furtherance of the very purposes of his ownership, and by one of the persons by whom he intended that purpose should be carried out. The court said:

> "It was in every just sense being used in his business by his agent. There is no possible distinction, either in sound reason, sound morals, or sound law, between her legal relation to the parent and that of a chauffeur employed by him for the same purpose. The fact that the agency was not a business agency, nor the service a remunerative service, has no bearing upon the question of liability. * * *
>
> "We think that both on reason and authority the daughter in the present instance should be held the agent of her parents in the use of the automobile. Any other view would set a premium upon the failure of the owner to employ a competent chauffeur to drive an automobile kept for the use of the members of his family, even if they knew that they were grossly incompetent to operate it for themselves. The adoption of a doctrine so callously technical would be little short of calamitous."

The frequent accidents occasioned by sons, daughters and friends who were not financially responsible, and the inability to reach the owner under the ordinary rules of law has caused most of the courts to progress and humanize the law of automobiles.

From the above cases it will be seen that some of the courts hold a father liable for an injury caused by a member of the family, no matter for what purpose the car was used. Other courts refuse to adopt the family automobile theory and apply the strict doctrine of master and servant. Others take a middle ground and apply the family automobile doctrine, but only in cases where the automobile was not being used for some strictly personal use of the driver as distinguished from a family use.

The *Central Law Journal* in a note reviewing some of the above

---

[22] 79 N. J. L. 99, 74 Atl. 267.

cases holding the father liable, says that the family automobile doctrine is an *extension* of the rule of *respondeat superior,* and justly so, because there is involved in use an agency whose use the law does not permit in the streets except one of "approved competency," and that when an automobile is maintained for family use, that should be considered as much as use in the owner's business, as is an auto-truck in his commercial business.[23]

It is very evident that the general trend of the decisions is to hold the father liable for an injury negligently occasioned by the family automobile no matter who was driving it or for what purpose it was being used. Plausible excuses are seized upon not merely to extend the rule of *respondeat superior,* but to depart from it.

The symmetry of the law would have been better preserved and such dodging and explaining avoided, if the courts had at the outset held the automobile a dangerous instrumentality and based liability on that doctrine or better still if the law of master and servant is inadequate in automobile cases, changes had been made by legislation as has been done in Massachusetts and other States.

Ashley Cockrill.

LITTLE ROCK, ARK.

---

[23] 75 Cent. L. J. 43.